

**RAIN CII CARBON, L.L.C.** \* **NO. 2018-CA-0916**  
**VERSUS** \*  
**RECON ENGINEERING, INC.** \* **COURT OF APPEAL**  
**AND RECON MANAGEMENT** \* **FOURTH CIRCUIT**  
**SERVICES, INC.** \* **STATE OF LOUISIANA**  
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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2018-03980, DIVISION "E"  
Honorable Melvin C. Zeno, Judge  
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**JAMES F. MCKAY III**  
**CHIEF JUDGE**  
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(Court composed of Chief Judge James F. McKay III, Judge Daniel L. Dysart,  
Judge Sandra Cabrina Jenkins)

**DYSART, J., DISSENTS**

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**AFFIRMED**

**MAY 1, 2019**

In this arbitration case, the intervenors, Catlin Specialty Insurance Company, Alterra America Insurance Company, First Financial Insurance Company, Chartis Specialty Insurance Company, and Illinois National Insurance Company, in their capacities as the alleged insurers of defendants, ReCon Engineering, Inc. and ReCon Management Services, Inc. (sometimes hereafter referred to collectively as ReCon), appeal the trial court's granting of a dilatory exception of lack of procedural capacity and its confirmation of an arbitration award in favor of plaintiff, Rain CII Carbon, L.L.C. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In 2010, Rain started a project to build a waste heat recovery power generation unit at one of its facilities in southwest Louisiana in order to capture heat exhausted from the calcinating process and convert it to usable electricity. For the project, Rain retained the services of Recon Engineering, Inc., Turner Industries Group, L.L.C., and Victory Energy Operations, LLC.<sup>1</sup>

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<sup>1</sup> For further background and a more detailed procedural history of the events preceding the present appeal, one may consult Rain CII Carbon, LLC v. Turner Indus. Grp., LLC, 17-223, unpub., (La.App. 3 Cir. 4/5/17), 2017 WL 1279653, ---- So.3d ---- .

On March 15, 2013, Rain originally filed suit against ReCon, Turner, and Victory in the 14<sup>th</sup> JDC for the Parish of Calcasieu. Due to an arbitration agreement between Rain and ReCon, ReCon compelled Rain to arbitration. Rain then sought to file a direct action claims against ReCon's insurers (Catlin Specialty, Alterra America, First Financial, Chartis Specialty, Illinois National, and Imperium Insurance Company).<sup>2</sup> Like ReCon, the insurers successfully argued that Rain could not litigate its claims against them due to the pending arbitration. Rain then proceeded to arbitration.

Rain sought to join the insurers to the arbitration proceedings but the insurers actively and successfully opposed joinder. The R-7 Arbitrator<sup>3</sup> found that the insurers were non-signatory parties and, therefore, could not be compelled to join the arbitration proceeding.

Rain arbitrated its claims against ReCon at a final hearing on September 28, 2017 in New Orleans. On October 26, 2017, the Arbitrator rendered an arbitration award in favor of Rain and against ReCon in the amount of \$4,430,404.74, representing a principal sum of \$3,388,707.00; interest from the date of the arbitration demand in the amount of \$638,933.74; and attorney's fees in the amount of \$402,764.00.

On April 24, 2018, Rain filed a motion to confirm arbitration award in the Civil District Court for the Parish of Orleans. On May 14, 2018, the insurers filed

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<sup>2</sup> While Imperium was named in an amending petition, it was not included in any subsequent pleadings.

<sup>3</sup> An arbitrator that decides jurisdictional questions

a petition for intervention and attempted to oppose confirmation. The insurers took a contrary position from what they had taken in the previous proceeding. They claimed that they did not have notice of the arbitration and the arbitration award should be vacated. In addition to their petition for intervention, the insurers filed an opposition to the motion to confirm arbitration award, a motion to vacate the arbitration award, a declinatory exception of lack of jurisdiction, and peremptory exceptions of no cause of action and no right of action. In response, on June 15, 2018, Rain filed exceptions of no right of action, no cause of action, lack of procedural capacity, and prescription, along with a motion for a protective order.

A hearing took place on July 6, 2018. On August 10, 2018, the trial court granted Rain's exception of lack of procedural capacity, which it found rendered the insurers' exceptions moot; granted the motion to confirm arbitration award; found Rain's other exceptions to be moot; and assessed all costs against the intervenors. It is from this judgment that the insurers now appeal.

## **DISCUSSION**

On appeal, the insurers raise the following specifications of error: 1) the district court erred in finding the insurers-intervenors lacked the procedural capacity to oppose the confirmation of an underlying, default arbitration award against their insured; and 2) the district court erred in confirming a default arbitration award entered by an arbitrator who "manifestly disregarded the law" and lacked jurisdiction.

“The de novo standard of review . . . applies to our review of the trial court’s ruling on a dilatory exception of procedural capacity.” English Turn Prop. Owners Ass’n v. Taranto, 16-0319, pp. 5-6 (La.App. 4 Cir. 4/19/17), 219 So.3d 381, 387, writ denied, 17-1100 (La. 10/16/17), 2017 WL 4891599, --- So.3d --- (citing Wells v. Fandal, 13-620, p. 7 (La.App. 5 Cir. 2/12/14), 136 So.2d 83, 87). *See also* Gunasekara v. City Of New Orleans through Munster, 17-0914, p. 3 (La.App. 4 Cir. 3/28/18), 243 So.3d 623, 626 (“The standard of review of a trial court’s ruling on an exception of no right of action is *de novo*.” (citations omitted); Woodard v. Upp, 13-0999, p. 5 (La.App. 1 Cir. 2/18/14), 142 So.3d 14, 18 (“[t]he determination of whether a party has the procedural capacity to sue or be sued involves questions of law which is reviewed under the *de novo* standard of review to determine whether the ruling of the trial court was legally correct.”))

“The dilatory exception of lack of procedural capacity raises the issue of want of capacity of the plaintiff to institute and prosecute the action and stand in judgment, and/or challenges the authority of a plaintiff who appears in a purely representative capacity.” English Turn., p. 6, 219 So.3d at 87. *See also* Harvey v. State, 14-0156, p. 12 (La.App. 4 Cir. 12/16/15), 183 So.3d 684, 695, writ denied, 16-0105 (La. 3/4/16), 188 So.3d 1060. The exception “tests a party’s legal capacity to bring suit.” Mt. Zion Baptist Ass’n v. Mt. Zion Baptist Church #1 of Revilletown Park, 16-0151, p. 5 (La.App. 1 Cir.10/31/16), 207 So.3d 414, 417, writ denied, 16-2109 (La. 2/3/17), 215 So.3d 697.

The insurers took a contrary position as they had taken in the previous proceeding. They claimed they did not have notice of the arbitration and that the arbitration award should be vacated, while ignoring the fact that Rain had sought to join the insurers to the arbitration. In support of the exceptions of lack of procedural capacity, no right of action, no cause of action, and prescription, Rain's central argument was that the insurers could not intervene because they were not parties to the arbitration, as required by La. R.S. 9:4209.

Under the express provisions of the Louisiana Arbitration Act<sup>4</sup> (La. R.S. 9:4210) and Section 10 of the Federal Arbitration Act<sup>5</sup> (FAA), only a "party to the arbitration can file a motion to vacate, modify, or correct an arbitration award. Rain tried to join the insurers in the arbitration, but the insurers objected and successfully opposed their joinder in the arbitration. Because the insurers were not parties to the arbitration, Rain filed an exception of lack of procedural capacity, among other exceptions, in response to the insurer's intervention and motion to vacate the arbitration award. The district court correctly sustained the exception of lack of procedural capacity and granted the motion to confirm the arbitration award.<sup>6</sup>

"[U]nless the award is vacated, modified, or corrected" under the exclusive statutory grounds, a court must grant a motion to confirm an arbitration award as expressly provided in La. R.S. 9:4209 of the Louisiana Arbitration Law and Section 9 of the FAA. Accordingly, there was no valid motion to vacate, modify,

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<sup>4</sup> La. R.S. 9:4201 *et seq.*

<sup>5</sup> 9 U.S.C. §§ 1 *et seq.*

<sup>6</sup> It would also be true that the insurers had no right of action rather than no procedural capacity. See Sivils v. Mitchell, 96-2528 (La.App. 1 Cir. 11/7/97), 704 So.2d 25, 27.

or correct the arbitration award before the trial court because the insurers did not qualify as “part[ies] to the arbitration” capable of filing a motion to vacate the arbitration award. On that basis alone, the district court was correct in confirming the arbitration award. Affirming the district court’s judgment sustaining the exception of lack of procedural capacity pretermits any consideration of the insurers’ arguments for vacatur.

## **CONCLUSION**

The district court correctly held that the insurers lacked the procedural capacity to file their motions in the judicial proceeding to confirm Rain’s arbitration award. In the 14<sup>th</sup> JDC, the insurers were able to repel Rain’s claims by arguing that Rain’s claims against ReCon must be arbitrated. In the arbitration, however, after Rain sought to join the insurers, the insurers successfully opposed joinder to the arbitration. As a result, the insurers were not parties to the arbitration and did not have the procedural capacity to later file motions in the judicial proceeding to confirm Rain’s arbitration award. Accordingly, the district court’s judgment is affirmed.

**AFFIRMED**